No. 77-388

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

STATE OF WASHINGTON; COUNTY OF YAKIMA; DIXY LEE RAY as Governor of the State of Washington and individually; SLADE GORTON, as Attorney General of the State of Washington and individually; LES CONRAD, GRAHAM TOLLEFSON and CHARLES RICH as County Commissioners and individually,
Appellants,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF APPELLEE

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FRANKLIN PRESS YAKIMA, WASHINGTON

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JURISDICTION

Jurisdiction, as claimed by Washington, will lie in this Court under 28 USC §1254(2). As specified in this section, the appeal shall be limited to federal ques-

tions presented. The Court has jurisdiction to determine if Washington met the federal requirements of Public Law 83-280 in enacting R.C.W. 37.12.010 as well as determining the Constitutional validity of R.C.W. 37.12.010. *Dandridge vs. Williams*, 397 U.S. 477 (1970).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional treaty and statutory provisions involved in this case are:

1. Amendment 14, §1, *United States Constitution.* Washington's Brief, p. 3.

2. Article I. *United States Constitution*, Yakima's Brief, p. 36.

3. Article III, §1, *United States Constitution*, Yakima's Brief, p. 36.

4. Public Law 83-280 (67 Stat. 588). Codified as follows: Sec. 2(a) as 18 USC §1162; Sec. 4(a) as 28 USC §1360. App. pp. 32-36.

5. Public Law 90-284, Title IV (83 Stat. 73 et. seq.) Codified as 25 USC §1321(a) and §1322(a). Washington's Brief, pp. 3-4.

6. Washington Laws of 1957, Ch. 240 as amended by the Laws of 1963, Ch. 36. Codified as Chapter 37.12 R.C.W. App. pp. 37-40.

7. *Treaty with the Yakimas*, Preamble, Article II, 12 Stat. 951, 2 Kappler 524, (June 9, 1855). Appendix A of Appendices to Respondent's Brief, hereafter cited as "Yak. App." - Yak. App. A.

8. *Treaty with the Walla Walla, Cayuse, etc.*, Article 8, 12 Stat. 945, 2 Kappler 521, 524 (June 9, 1855). Yak. App. C.

9. Section 4, Enabling Act, Ch. 180 §4, Laws of 1889, 25 Stat. 676. Yak. App. D.

10. Article XXVI, *Washington State Constitution.* Yak. App. E.

11. Article XXIII, §1, *Washington State Constitution.* Yak. App. F.

12. Article I, §29, *Washington State Constitution.* Yak. App. G.

13. 18 U.S.C. §1151, Yak. App. H.

QUESTIONS PRESENTED

In noting probable jurisdiction, this Court directed the parties to address the following ultimate question:

> "Whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian Reservation pursuant to Public Law 280 violates either the statutory requirements of Public Law 280 or the Equal Protection Clause of the Fourteenth Amendment."

Within that ultimate question are these involved issues:

> (1) Whether Washington's failure to amend its Constitution disclaiming jurisdiction over the Yakima Indian Reservation prior to assuming jurisdiction over the Yakima Nation and its members violates the Statutory requirements of Public Law 280.
>
> (2) Whether Washington's failure to amend its Constitution disclaiming jurisdiction over the Yakima Indians in compliance with the mandatory requirements of its Constitution violates the Equal Protection Clause of the Fourteenth Amendment.
>
> (3) Whether Washington's assumption of partial geographic and subject matter jurisdiction over the

Yakimas is in compliance with statutory requirements of Public Law 280.

(4) Whether Washington's system of partial geographic and subject matter jurisdiction over the Yakimas violates the Equal Protection Clause of the Fourteenth Amendment. This issue has three sub-issues:

(a) Whether a "suspect class" or "fundamental interest" exists making the strict scrutiny-reasonable necessity test or the rationale basis test applicable.

(b) Whether Washington's system of partial geographic and subject matter jurisdiction is in compliance with either test providing Yakimas with equal protection in compliance with the Fourteenth Amendment.

(c) Whether Washington's system of partial geographic and subject matter jurisdiction meets constitutional standards of definiteness to assure Yakimas substantial due process in compliance with the Fourteenth Amendment.

Before reaching the ultimate question and the foregoing included issues, these following threshold questions need determination by this Court:

1. Whether Congress, in the passage of Public Law 280 abrogated or modified the *Treaty with the Yakimas*, and its reserved and guaranteed rights of the Yakimas to self-government by its "own government" and its "own laws" so as to authorize Washington to assume jurisdiction over the Yakima Nation and its members.

2. Whether Congress in its passage of Public Law 280, authorized Washington to assume jurisdiction over the Yakimas without either the Yakima Nation's or the federal government's consent.

If this Court answers the foregoing questions and

issues adverse to the Yakimas, there then arises the question of whether state jurisdiction under RCW 37.12.010 is exclusive. In such an event, this Court should determine this question.

STATEMENT OF THE CASE

Appellee-Plaintiff, Yakima Nation, objects to Washington's Statement of the Case in that it omits certain pertinent facts essential to a full and accurate statement and makes unsubstantiated conclusions. The statement is strongly biased in Washington's favor.

A. The Statutory Scheme.

In considering Washington's assumption under Public Law 83-280, an outline of the summary and hurried adoption of this Act by Congress, is in order. This Act was adopted during a period in which express federal policy towards Indians sought to terminate federal responsibility for, and special relationships with, Indian tribes.[1] Individual bills were introduced early in the 83rd Congress to transfer civil and criminal jurisdiction over Indian country in the States of California, Minnesota, Nevada, Oregon and Wisconsin. The House Committee took the California bill, H.R. 1063, and turned it into a bill of general application.

[1]Congressional policy towards Indian tribes can be said to have oscillated between the view that they are conquered, but nonetheless sovereign peoples with the right to control *their own* destiny and the view that they are to be assimulated — regardless of their wishes — into the dominant culture as rapidly as possible. FINAL REPORT of THE AMERICAN INDIAN POLICY REVIEW COMMISSION, Volume I, Chapter I, (Submitted to Congress on May 17, 1977).

H.R. 1063 as amended, accomplished a transfer of jurisdiction in the five specified states.[2] The report from the Department of Interior on the bill stated that the Bureau of Indian Affairs had consulted with Indian groups in only the five named states, and Nevada and Washington. Interior noted objections from five Indian tribes including the Yakimas.[3] The tribes that requested exemption from the Act in the five named states were exempted. The House Subcommittee on Indian Affairs held a short hearing on June 29, 1953.[4] Thereafter, the House Interior Committee held a short hearing on July 15, 1953.[5] The Interior Committee issued its report on July 16, 1953.[6] On July 27, 1953, the bill was placed on the House consent calendar and was adopted without debate.[7] Two days later, on July 29, 1953, the Senate Committee on Interior and Insular Affairs reported the bill without amendment or open hearing.[8] The Senate Interior Committee Report broke no new ground and was largely a reprint of the House Committee Report. On August 1, the bill was placed on the consent calendar, taken up on the floor of the Senate and with one

[2]California, Minnesota, Nebraska, Oregon and Wisconsin.

[3]Letter from Orme Lewis, Assistant Secretary of the Interior, to Rep. Miller, Chairman of the House Committee on Interior and Insular Affairs, July 7, 1953, contained in House Report No. 848, 83rd Congress, 1st Session.

[4]Yakima App. I, pp. *1-20*. No Indian testimony solicited.

[5]Yakima App. I, pp. *21-34*. No Indian testimony solicited.

[6]H. Rept. No. 848, 83rd Congress, 1st Session (July 16, 1953).

[7]99 Cong. Rec. 9962 (July 27, 1953).

[8]S. Rept. No. 699, 83rd Congress (July 29, 1953).

amendment was passed by a voice vote.[9] This one amendment deleted Section 8, concerning the applicability of federal liquor laws to Indians in the States assuming criminal jurisdiction from the bill. Later the same day, the bill as amended by the Senate, was brought before the House on a motion to concur in the Senate Amendment. Without debate, the House concurred in the deletion of Section 8 and sent the bill to the President for his signature.[10] On August 15, 1953, President Eisenhower, although expressing "grave doubts" about parts of the bill, signed it into law:

> "I have . . . signed it because its basic purpose represents still another step in granting complete political equality to all Indians in our Nation. . . . My objection to the bill arises because of the inclusion in it of Sections 6 and 7. These sections permit other states to impose upon Indian tribes within their borders, the criminal and civil jurisdiction of the State, removing the Indians from federal jurisdiction, and in some instances, effective self-government. The failure to include in these provisions a requirement for full consultation in order to ascertain the wishes and desire of the Indians and of final federal approval, was unfortunate. I recommend, therefore, that at the earliest possible time in the next session of the Congress, the act be amended to require such consultation with the tribes prior to the enactment of legislation subjecting them to State jurisdiction, as well as approval by the Federal Government before such legislation becomes effective."[11]

[9]99 Cong. Rec. 10782-84 (August 1, 1953).

[10]99 Cong. Rec. 10928 (August 1, 1953).

[11]Statement by President Eisenhower, August 15, 1953, Reprinted in 102, Cong. Rec. 399 (January 12, 1956).

In 1955, the next session of the Washington State legislature following the enactment of Public Law 83-280, proponents of state jurisdiction over Indians introducted a bill to amend Article to amend Article XXVI of the Washington State Constitution. Article XXVI of the Washington State Constitution disclaims jurisdiction over Indian reservations. This bill failed to clear Committee and did not pass.[12]

In 1957, purportedly acting pursuant to Public Law 83-280, the Washington legislature authorized the governor to issue a proclamation assuming civil and criminal jurisdiction over any Indian reservation at the request of the Indian tribes.[13] The Yakima Indian Nation made no such request.

In 1963, the State of Washington amended its 1957 statute to provide for assumption of jurisdiction without tribal consent.[14] Under the amended statute, when a tribe consents to state jurisdiction over its reservation, the State assumed jurisdiction over "all Indians and all Indian territory, reservations, country, and lands of the Indian body involved to the same extent that this state exercises civil and criminal jurisdiction or both elsewhere within the State."[15] When a tribe does not consent, as the Yakima Nation did not, this

[12]1955 Washington State Senate Journal, pp. 153, 184, 1082.

[13]Laws of Washington, 1957, Ch. 240, Sec. 1.

[14]Laws of Washington, 1963, Ch. 36, App. 37-40.

[15]R.C.W. 37.12.060. App. p. 38.

1963 Act assumed full civil and criminal jurisdiction with regard to fee land, but with regard to non-fee lands, (i.e. tribal lands or allotted lands held in trust by the United States), the State assumed jurisdiction *so far as Yakima Indians were concerened*,[16] only with respect to eight categories of subject matter. These eight categories were: compulsory school attendance, public assistance, domestic relations, mental illness, juvenile delinquency, adoption proceedings, dependent children, and the operation of motor vehicles upon the public streets, alleys, roads and highways.[17]

In signing the 1963 bill, Washington's Governor Rosellini, in a message to the Senate, said:

> "I have signed into law with some reluctance, Senate Bill No. 56 . . .
>
> "I am aware and proud of the fact that some of the Indian tribes during the past years have vastly improved their own law enforcement agencies on their reservations. I am not unmindful of the fact that under this bill certain criminal activities by Indians might be committed on deeded lands, as distinguished from private lands, will create local law enforcement problems because it may be difficult to determine on the spur of the moment whether a given act is subject to federal, state or tribal jurisdiction.
>
> "I sincerely and deeply regret that all of the Indian tribes, since the enactment of Public Law 280 in 1953 by Congress, have not voluntarily consented to complete civil and state jurisdiction. Unfortun-

[16]R.C.W. 37.12.010 (App. p. 37), specifies that the Indians excluded from the total state jurisdiction shall be those Indians who are on *"their* tribal lands or allotted lands."

[17]R.C.W. 37.12.010 (App. p. 37).

ately, in a few areas of the state the absence of state jurisdiction over certain civil and criminal matters has caused great difficulties in enforcement and has resulted in unnecessary hardships, particularly concerning children. I have been strongly urged by many local civil and law enforcement authorities in those areas to sign this Bill. Several members of the Supreme Court in their biennial reports to me likewise have urged that the state assume complete criminal and civil jurisdiction. This is necessarily a compromise bill insofar *as it does not assume complete civil and criminal jurisdiction.*

"To the extent that this bill may conceivably be in violation of the equal protection and due process clauses of the State and Federal Constitution, I trust that those matters will be taken to court for early determination."[18] (Italics supplied).

Finding Washington's system unworkable and failing to get legislative relief, the Yakima Nation sought judicial intervention.

B. **Action of the Courts Below.**

The Yakima Nation filed this suit in the United States District Court for the Eastern District of Washington seeking a declaration that the partial assertion of state jurisdiction over its reservation was invalid and requesting an injunction against the continued exercise of such jurisdiction. The Yakima Nation contended (1) that Public Law 280 did not permit a partial assumption of jurisdiction either by geography or subject matter; and (2) that the State had failed to comply with the requirements of Public Law 280 that it amend its constitution before asserting any jurisdic-

[18] 1963 Washington State Senate Journal, p. 939.

tion over Indian lands within the State. The Yakima Nation also argued that Washington's partial assumption of jurisdiction by geography and subject matter, even if authorized by Public Law 280, violated constitutional requirements of due process and equal protection. Finally, the Yakima Nation contended that any state jurisdiction was at most concurrent with tribal jurisdiction.

The District Court denied relief. On the issue of the State's compliance with Public Law 280, the court held (J.S. App. D, p. 63) that it was bound by the decision of the Ninth Circuit in *Quinault Tribe of Indians v. Gallagher*, 386 F. 2d 648 (9th Cir. 1966), certiorari denied, 387 U.S. 907 (1967), determining that the State, without amending its constitution, could assume partial geographic and subject matter jurisdiction over Indian reservations where the tribes had the option of requesting that full jurisdiction be assumed. Though noting that Washington's jails were "inadequate," that adopted Yakima children suffered "cultural shock," "*loss of* hunting and fishing rights," "tribal membership", "support while seeking higher education" and "entitlement to share in the annual [Yakima] per capita distribution", that the handling of Indian juveniles was "less than perfect", that there was a sincere dissatisfaction over the adequacy of state law and order, that "plaintiff is representative of a

class of people historically saddled with disabilities", having been "subjected to unequal treatment and traditionally . . . politically powerless to act"; but that the right of the "plaintiff tribe to be a dependent people, protected by the federal government" was "not a fundamental right protected by the Constitution." (J.S. App. D. pp. 63, 64). Testimony showing specific acts of state: (a) brutality to Indians, (b) failure to investigate specific crimes involving Indian victims, (c) failure to respond to specific calls and (d) difference in treatment of Indian offenders (Tr. 338-445), though unexplained by Washington; was ignored by the Trial Court in its opinion. The Trial Court found there was a difference in state financing for law enforcement between city and county areas, but placed the burden of showing a non-rational basis on the Yakimas. (J.S. App. p. 65).

The Yakima Nation appealed to the Court of Appeals for the Ninth Circuit. The Court of Appeals, sitting *en banc*, adhered to its decision in *Quinault Tribe of Indians v. Gallagher*, *supra*, that Public Law 280 allowed the assumption of partial subject matter and partial geographic jurisdiction. The majority (seven judges) found that "the applicable legislative history of P.L. 280 provides reasonable support for *Quinault*" (J.S. App. C, p. 44). The majority opinion noted, however, that "Washington's checker-boarding

of criminal jurisdiction [on the Yakima Reservation] might appear particularly inefficient and that its elimination may be desirable" *(id.* at 45).

Five dissenting judges to the *en banc* majority opinion, concluded that *Quinault* should be overruled. They noted Congress' recognition that "checkerboard" jurisdiction was "antithetical to effective law enforcement" *(id.* at 53) and pointed out that even the State had agreed that "[t]he Yakimas have no effective law enforcement on their reservation" *(id.* at 54). The dissenters also relied on the legislative history of Public Law 280 and the 1968 amendments to Public Law 280, which they said indicated that partial subject matter jurisdiction had not previously been authorized *(id.* at 58).

On remand from the *en banc* court, a panel of the Court of Appeals turned to the constitutional issues and held that Washington's partial assumption of jurisdiction on the basis of "land-title classification" (i.e., full jurisdiction over fee but not over non-fee land) violated the equal protection clause of the Fourteenth Amendment (J.S. App. A 33). The unanimous panel noted that a Yakima Indian living on non-fee land was denied law enforcement protection from the State of Washington on that basis alone, while a Yakima Indian living on an adjoining parcel of fee land received protection *(ibid.)*. This discrimination, the

court held, lacked a rational basis because "[t]he state's interest in enforcing criminal law is not less 'fundamental' or 'overriding' on non-fee lands than on fee lands," and "[n]o showing has been or can be made that the happenstance of title holding is related in any way to the need by the land occupants for law enforcement" *(id.* at 35). The Court further concluded that the unconstitutional provision was not severable from the remainder of the statute and hence that "the whole statute must be rewritten" *(id.* at 36).

On Washington's appeal from this decision, this Court has noted probable jurisdiction.

C. Applicable Facts.

Plaintiff Appellee is an Indian Nation established by Treaty with the United States explicitly and implicitly reserving in that treaty its power to be governed by "its own laws" and by "its own government."[19] The Yakima Reservation is basically a rural area having three small incorporated towns within. Members of the Yakima Indian Nation and other Indian tribes reside within both the urban and rural areas of the Yakima Indian Reservation. There are no non-Indian communities located within the exterior boundaries of the reservation.[20]

[19]See: Discussion of "Status of Yakima Nation," in this Brief.

[20]Pre-Trial Order, R 519-520. Reservation urban population: Harrah: 277 non-Indians. 28 Indians. Toppenish: 5410 non-Indians. 334 Indians. Wapato: 2590 non-Indians. 251 Indians.

Washington's conclusion regarding the stipulation contained in the Record on pages 722 to 729 at page 13 of their Brief is in error. What Exhibit A does show is that Yakima County's cost per capita for law enforcement in the amount of $4.86 per capita does not compare favorably with the statewide mean average of $7.46. The highest county per capita expenditure was Skamania with a per capita cost of $23.39 and the lowest county per capita expenditure was Jefferson County $3.69. It likewise shows that all of the cities within the State of Washington are spending many times per capita what is spent on the county level and that in Yakima County, the City of Yakima spent 640% more per capita for law enforcement then does Yakima County. It likewise shows that the number of law enforcement personnel in urban areas is much higher per capita than in rural areas and that Yakima County does not compare favorably with other selected counties. It also shows that Yakima County's clearance rates for Class I offenses is likewise not comparable with urban clearance rates or with other counties.[21]

[21]Compulations supplied. Figures taken from Exhibit A of stipulation.

Washington's contention below, as it is now at J.S. 13, is that they owe us no duty under the law to provide adequate or even average law enforcement. They contend that if the Yakimas receive law enforcement on their reservation equivalent to the worst law enforcement anywhere in the State of Washington, then this is equal protection. The Yakimas contend, that in view of the state's unilateral assumption of jurisdiction, that they must furnish to the Yakimas Indian law enforcement that is the equivalent of law enforcement furnished elsewhere in the state.

Much of the reasons for these facts is that Washington's taxing system discriminates against counties and rural areas. However, this is not the only reason. Yakima County ranks 37th out of 39 for County taxes per capita and in the year in which the trial was held, took over one million dollars of its federal revenue sharing funds which could be used for law enforcement to further reduce its low per capita tax assessment (Tr. 38, 46, 43, 85, 86).

Washington's *partial assumption* system imposes upon the Yakima Reservation a Washington law enforcement pattern that varies from tract to tract depending upon the title to the particular parcel of land, from crime to crime depending upon whether the crime was one of the categories over which Washington had assumed partial jurisdiction, and from person to person depending upon whether the violator was a member or non-member of the Yakima Nation, and from person to person depending upon whether a Yakima juvenile or adult is involved. Yakimas under this law enforcement pattern, have no effective law enforcement on their reservation. Washington acknowledges this reality (App. 41-51) as does the Court of Appeals for the Ninth Circuit (J.S. App. C., p. 54). In spite of the increase of crime on the Yakima Reservation (Tr. 221, 234), Washington's system of partial assumption of jurisdiction has resulted in the decline of both felony

and misdemeanor arrests on the rural portions of the Yakima Reservation where most of the Yakimas reside. In 1963, there were 46 felony arrests on this portion of the reservation. In 1971, Washington made two felony arrests. In 1963, there were seventeen misdemeanor arrests on that portion of the reservation; in 1971 Washington made four misdemeanor arrests. (Ex. 56, Tr. 273). Yakima County's clearance rate and amount of coverage is below national and other guidelines. Another thirty deputies would be required to meet these standards. (Tr. 124, 125). The Yakima Reservation occupies 46.4% of the land encompassed by Yakima County. Reservation residents constitute almost half of the rural population of the county and 80% of Yakima Nation's members live in this rural lower valley portion of the county. (Ex. 55, App. 52, Tr. 273). No Yakima County Sheriff's office or Washington State Patrol office exists on the reservation. The promised toll free system to contact a sheriff's office has not been provided.[22] Of the 29 deputy sheriffs assigned to work in the field at the time of trial, only two were assigned to reservation patrol. (J. S. App. C, p. 54). The Yakima County Sheriff and Director of County Juvenile Department have said that Washington cannot do a good job with juveniles when it has no jurisdiction over

[22]This sentence is outside of the record, but made necessary by the Trial Court's reliance on Washington's promise that one would be provided.

parents and the sheriff has stated that fragmented jurisdiction has hampered police work in other law enforcement areas as well. (J. S. App. C, p. 54, Tr. 123, 124, 139, 167, 168, 174-176). Yakima County's Juvenile Director has stated that there are more resources made available by Washington to deal with white children then there are to deal with Indian children. (Tr. 172). Juvenile officers have no training about Indian culture. (Tr. 196). The Yakima County Prosecutor testified that the Washington assumption statute was confusing and different prosecutors interpreted the Act in different ways (Tr. 212). Deputy Sheriff, Del Young, who had worked the reservation before and after the Washington assumption statute said that there was no change in the sheriff's office to take care of the added burden after state assumption (Tr. 215). Though the Sheriff tried to tie the Reservation Patrol in with the Sunnyside Office, Deputy Young testified that he had not been in the Sunnyside Office for over a year. (Tr. 215). It could not be remembered by those who were familiar with reservation enforcement when Deputy Sheriff Young made an arrest. In contrast, the Yakima Indian Nation was expending over twice per capita for law enforcement on the Yakima Reservation for the Indians and non-Indians population and almost sixteen times more for its own citizens on the Reservation as Yakima County was spending for its citizens

within Yakima County.[23] Washington law enforcement officers classified the Yakima Nation's law enforcement branch as an excellent department. (Tr. 230).

It was clear throughout the testimony that the Yakima Nation wished to have the jurisdictional situation straightened out so it could provide good law and order on the Reservation which the State of Washington was unwilling or unable to do.

Washington cannot disregard this overall situation by excerpting certain individual statements. The Yakimas do not dispute that its law enforcement officers have done everything they can to make the present system work and have cooperated very well with state officers. However, as the record shows, and as an expert testified; this system of partial geographic and subject matter assumption will just not work no matter how much cooperation the Yakima Nation is willing to give. (Tr. 307-316).

D. Situation if R.C.W. 37.12.010 Void.

Washington has taken several pages (19-27) of its brief to discuss the effect of striking down R.C.W. 37.12.010, on crimes committed within the exterior boundaries of the Yakima Reservation. A short discussion is in order.

Under 18 USC §1151, and 18 USC §1152, federal enclave criminal jurisdiction covering all general crimi-

[23]See Note 21.

nal laws of the United States and under the Assimiulative Crimes Act (18 USC §13), — the criminal laws of the State of Washington — to all crimes, where an Indian or his property is involved. Excepted from these general laws are crimes where *no* Indian or his property is involved *(United States v. McBratney,* 104 U.S. 621 (1882) and minor crimes where *only* Indians and their property are involved and the Indian "has been punished by the local law of the tribe." For major crime listed in the Major Crimes Act, 18 USC §1153, an Indian violator would be liable regardless of who the victim was.

It would appear that this Court has held in *McBratney, Supra,* and *Draper vs. United States,* 164 U.S. 240 (1896) that Washington — exclusive of RCW 37.12.010 — has jurisdiction over non-Indian crimes. However, these problems are not now before this Court for determination. This action was brought to declare that R.C.W. 37.12.010 does not affect members of the Yakima Nation.

In any event, if this Court upholds the Court of Appeals in striking down RCW 37.12.010, it will enable Washington tribes, in cooperation with Washington and the United States, to fashion an adequate law enforcement system — pursuant to 25 USC §1321(a) — on the Yakima Reservation.

E. **Status of Yakima Indian Nation.**

The Confederated Tribes and Bands of the Yakima

Indian Nation is an Indian Nation established by Treaty with the United States of America in 1855 and has a government duly recognized by the Secretary of Interior.[24] Among the rights that have been guaranteed and reserved to this signatory Indian tribe is the right to control its internal affairs within the Yakima Indian Reservation through an Indian government. The treaty reservation and guarantee of these rights is *explicit.*

The Yakimas were *explicitly* guaranteed that they were to have "their own government" and were to have "their own laws."[25] Other treaties signed the same day as the Treaty with the Yakimas provide for submission to the laws of the United States but Article VII of the *Treaty with the Yakimas* merely acknowledges dependency and does not provide for submission to the laws of the United States.[26] The Yakima Treaty together with its legislative history in the Treaty Minutes which are to be read in interpreting the Yakima Treaty;

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[24] *Treaty with the Yakimas,* Yak App. A; R. 486.

[25] See: Record of the Official Proceedings at the Council in the Walla Walla Valley (June 9 and 11, 1855) Yak. App. B and hereinafter referred to in this Brief as "Treaty minutes." Excerpts of these treaty minutes pertaining to this footnote are discussed later in this Brief at p. .....

[26] Comparing Article 8, *Treaty with the Walla Walla, Cayuse, etc.,* Yak. App. C with Article VIII of the *Treaty with the Yakimas,* Yak. App. A, p. A2. Also see: *Worcester v. Georgia,* 6 Pet. 515 (1832):

> "[T]he senate docketing of the law of nations is that a weaker power does not surrender its Independence — its right to self-government, by associating with a stronger, and taking its protection. A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a state."

clearly provides that the Yakimas were to be *exclusively* governed by their own laws. At that treaty council, Governor Stevens, United States Treaty Commissioner, after describing how he wished to separate the Yakimas to an area exclusive for their use to protect them from the white man said:

> "Let us go back to old times across the mountains and see what was there done. The Red Man received the white man gladly; but after awhile difficulties arose; the blood of the red man was spilled and the blood of the white man; there was cold, there was hunger; there was death. But a man came, William Penn, and said: I will see if my white children and my red children cannot be friends and they were friends. William Penn and the Indians came together as we now come together, they made a treaty, there was peace, no white man's blood and no red man's blood has been shed, and there has been peace to this day; this was in olden times."

Oh! These people said we too will make treaties; we too will live in peace. They tried various plans, a plan that worked well when there were few whites, did not work well where there were many. It was found that when the white man and the red man lived together on the same ground, the white man got the advantage and the red man passed away.

The Great Father's name at that time was Andrew Jackson; he said "I will take the red man across the river into a fine country where I can take care of them; they have been there twenty years; they have *their own government*, they have their own schools, *they have their own laws*, their Chief John Ross knows as much as my brother or myself and a great deal more; he is what you call a lawyer; he is an Indian, a Cherokee. When he goes to see the Great Father, the President, he sits with him at a table as you sit with us at table.

> Before you met my brother and myself and council, you *have your own council;* and the great white father when he acts has his council also, he has his chiefs.
>
> When I saw the Great Father, he called his chiefs together and had a council about you. He has two chiefs who have care of the red man, their names are Gen'l Orr and Robert Johnson, and I want you to remember them. Robert Johnson lives near John Ross; they both told me that *what has been done for John Ross should be done for you,* and more as I will tell you."[27]

The *Treaty with the Yakimas* clearly states that the signatory fourteen tribes and bands "for the purposes of this *treaty,* are to be considered as one *nation.*"[28]

In *Worcester v. Georgia,* 6 Pet 515 (1832), Chief Justice Marshall explained the legal affect the use of the terms "treaty" and "Nation":

> "The term "Nation" so generally applied to them means a "people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the Supreme law of the land, has adopted and sanctioned the previous treaties with the Indian Nations, and consequently admits their rank among those powers who are capable of making treaties. The words "treaty" and "Nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, and have a definite and well understood meaning. We have applied them to Indians, as we have applied them to other nations of the earth. *They are applied to all in the same sense.*" (Italics supplied). 6 Pet. 559-560.

This was the law of the land at the time of the

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[27]Yak. App. B, p. 1-3.

[28]Yak. App. A, p. 1. Emphasis supplied.

execution and ratification of the *Treaty with the Yakimas* and explicitly establishes the sovereignty of the Yakima Indian Nation—except as limited by the terms of the Yakima treaty.

Article II of the *Treaty with the Yakimas* provides that the Yakima Indian Reservation is to be set apart for the exclusive use and benefit of the Yakimas and that no one except United States government personnel was to enter the reserved area without the permission of the Yakimas and the United States.[29] This Court, in *Williams v. Lee*, 358 U.S. 217 221 (1958), explained the legal affect of that language:

> "[I]n return for [Indian] promises to keep peace, this treaty 'set apart' for their permanent home a portion of what has been their native country, and provided that no one, except United States government personnel, was to enter the reserved area. *Implicit* in these treaty terms, as it was in the treaties with the Cherokees involved in *Worcester v. Georgia*, was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government exists."

This implicit right of self-government that flows from this portion of a treaty was reaffirmed and expanded in 1972 by this court in *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 173-175 and recently in *United States v. Wheeler*, ___ U.S. ___ 46 L.W. 4243, (Opinion March 26, 1978). These cases also make it clear that the Yakimas right of self-government *con-*

[29]Yak. App. A, p. 1.....

tinues to exist until *lawfully* abrogated or modified by Congress.

SUMMARY OF ARGUMENT

This Court has made it clear that a treaty reserved or guaranteed right continues to exist until clearly abrogated or modified by Congress. The presumption is against abrogation or modification. The explicit and implicit Treaty reserved and guaranteed rights of the Yakimas to self-government was not changed by Congress in the enactment of Public Law 83-280. Congress did not include objecting tribes in the five named states, and intended to exclude the Yakimas. Public Law 280 does not meet the necessary standards of abrogation and modification, established by *Menominee v. United States*, 391 U.S. 404 (1968). Under, *Delaware Tribal Business Committee v. Weeks*, 429 U.S. ___, 97 S. Ct. 911, (1977), this action of Congress is reviewable. Inclusion of the Yakimas in Public Law 83-280, and authorizing Washington to assume jurisdiction over the Yakimas without complying with the mandatory requirements of its Constitution, and without establishing a system that would provide protection to the Yakimas, would violate the Fifth Amendment. Congress did not intend such an unconstitutional result.

Washington's assumption of jurisdiction without amending its constitutional disclaimer of jurisdiction over Indians does not meet the statutory requirements

of Public Law 83-280 or the due process requirements of the Fourteenth Amendment. The proviso in Section 6, Public Law 83-280, applicable to Washington, on its face provides that state assumption under Public Law 83-280, "shall not become effective", "until the *people*" [Washington's electorate] "have appropriately amended their state Constitution." Likewise, Public Law 83-280's legislative history, evidenced by (a) Subcommittee hearings, (b) Committee hearings, (c) Departmental reports, (d) Committee reports, (e) Statements on the Senate floor; clearly demonstrate that Congress believed that the Amendment of Article XXVI, of Washington State's Constitution disclaiming jurisdiction over reservations was necessary prior to Washington's assumption of jurisdiction. Washington did not amend Article XXVI, which is a mandatory article of its Constitution, and purported to assume jurisdiction over the Yakimas without the consent of "the people" by a mere legislative act that did not refer to Washington's constitutional disclaimer. Washington's failure to remove its constitutional disclaimer before assuming Indian jurisdiction under R.C.W. 37.12.010 violates the statutory requirements of Public Law 83-280 and the due process requirements of the Fourteenth Amendment. *Kennerly v. District Court*, 400 U.S. 423, (1971) and *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973).

Washington's partial geographic and subject matter assumption does not meet the statutory requirements of Public Law 83-280. Section 2a and 4a of Public Law 83-280, provides that state jurisdiction assumed under the Act shall be exercised "to the same extent" and have the "same force and effect within Indian country as they have elsewhere" in Washinton. Public Law 83-280, was an amendment referenced to the portion of the United States Code, containing 18 U.S.C. §1151. Section 1151 provides that "Indian country" shall be the entire reservation "notwithstanding the issuance of any patent." Washington in its unilateral assumption limited its exercise of jurisdiction over Indians to less than all Indians, to a limited extent, force and effect and excluded patented land from "Indian country" creating a congressionally unfavored "checkerboard" system with unequal and unclear protection. Likewise, Public Law 83-280's legislative history evidenced by committee hearings, previous legislation and subsequent legislation, demonstrates that "Indian country" as previously defined and total state assumption were the required perimeters of permissible state assumption. Washington's partial geographic and subject matter assumption is not in compliance with the statutory requirements of Public Law 83-280. *Kennerly, supra, Mattz v. Arnett*, 412 U.S. 481 (1973), and *Seymour v. Superintendent*, 381 U.S. 351 (1962).

Washington's partial geographic and subject matter assumption system violates the Equal Protection Clause of the Fourteenth Amendment. The Circuit Court held that Washington's partial assumption based on land title classification "fails to meet any formulation of the rational basis test." The Court of Appeals therefore, found it unnecessary to determine if under a two-tier test, strict scrutiny was required. However, as Yakima Indians in this case are a "suspect class" and have the "fundamental right" of self-government and protection involved; strict scrutiny is required. Washington's R.C.W. 37.12.010 meets neither test. Since the declared and permissible purpose of the legislation permitting and assuming jurisdiction over the Yakimas is the protection of the person, property and liberty of these Yakimas, any legislative purpose that is not reasonably necessary or does not have as its rational basis the satisfaction of this purpose; violates the Equal Protection Clause of the Fourteenth Amendment. Washington's alleged purpose cannot satisfy either the reasonable necessity test or the rational basis test, and violates the Equal Protection Clause of the Fourteenth Amendment. *Massachusetts Board of Retirement v. Muguria*, 427 U.S. 307 (1976), *Delaware Tribal Business Committee v. Weeks*, ___ U.S. ___, 97 S. Ct. 911 (1977), *Bryan v. Itasca County*, ___ U.S. ___, 97 S. Ct. 2102 (1976).

Likewise, in its partial assumption of subject matter, Washington by its mere recitation of eight categories without further definition or reference, does not meet the standards of definiteness required by the Fourteenth Amendment. R.C.W. 37.12.010 violates this Court's requirements of adequate notice and non-discretionary standards required by the Fourteenth Amendment. *Connolly v. General Construction Co.*, 269 U.S. 385 (1926) and *Bigelow v. Virginia*, 421 U.S. 809 (1975).

Respondents conclude that R.C.W. 37.12.010 does not separately — or at least cumulatively — meet the statutory requirements or required purpose of Public Law 83-280 or the Equal Protection Clause of the Fourteenth Amendment.

If this Court does not so conclude, we call to this Court's attention that the question of whether Public Law 83-280 is exclusive or concurrent remains to be determined. It was not necessary for the Court of Appeals to reach this question raised by Respondent below. Alternatively, this question should be determined by this Court. Public Law 83-280 and R.C.W. 37.12.010 do not negate existing sovereignty and jurisdiction of the Yakima Nation. *United States v. Wheeler*, ___ U.S. ___, 46 L.W. 4243 (1978).

ARGUMENT

I. YAKIMAS NOT WITHIN PURVIEW OF R.C.W.

37.12.010, AS CONGRESS DID NOT ABROGATE YAKIMAS EXCLUSIVE TREATY RIGHT OF SELF-GOVERNMENT BY PUBLIC LAW 83-280.

This Court has consistently recognized that treaties with Indian Tribes bind the United States[30] and preclude state action that violates treaty provisions.[31] While we are here involved in attempted state incursions upon treaty rights of self-government, the state is basing its primary authority on the delegation of permission for this intrusion on Public Law 280. Therefore, an initial discussion of whether this Congressional intrusion of Public Law 83-280 meets the guidelines of this Court, is in order. If Public Law 83-280 does not meet these guidelines, R.C.W. 37.12.010 does not affect the Yakimas and this Court should so declare.

We do not here argue that the existence of a treaty right, whether express or implied, imposes an absolute bar to Congressional action in violation of that right. We do, however, raise the questions as to whether the Congressional intent that must be manifested in the enactment of Public Law 280 supports a finding of abrogation of this fundamental treaty right of the Yakimas without their consent.

Although the quantum of Congressional intent that

[30]*Squire v. Capoeman,* 351 U.S. 1, 6 (1956). See also: *United States v. White,* 508 F. 2d 453 (8th Cir. 1974).

[31]*Menominee Tribe v. United States,* 391 U.S. 407 (1968). See also: *United States v. Washington,* 520 F. 2d 696 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

must be manifested in a statute or its legislative history to support a finding of abrogation has not been uniformly defined, this Court has set up a heavy presumption against abrogation.[32] In fact, in the past fifty years[33] this Court has not found an Indian treaty to have been abrogated by less then express language. In the leading case of *Menominee Tribe v. United States,* 391 U.S. 404 (1968), this Court considered whether a congressional act terminating federal supervision over an Indian tribe abrogated the hunting and fishing rights previously guaranteed by treaty so as to permit state intrusion. Despite the seemingly unequivical language of the Act that after termination of the reservation "the laws of several states shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction,"[34] this Court noted that the Act did not explicitly terminate treaty rights[35] and declined to construe the Act as "a backhanded way" of achieving the result.

[32]This Court uses various expressions to describe this presumption against abrogation. This Court recently has shown a preference for the formulation that abrogation will be found "only upon a clear showing" of Congressional intent. *DeCoteau v. District Court,* 420 U.S. 425, 440 (1975); *Mattz v. Arnett,* 412 U.S. 481, 505 (1973). This Court has also said that abrogation shall not be lightly implied. *Squire v. Capoeman,* 351 U.S. 1, 8 (1956). See also: *Kimbel v. Callahan,* 493 F. 2d 564, 568 (9th Cir. 1974, cert. denied, 419 U.S. 1019 (1974).

[33]Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long As Water Flows or Grass Grows Upon the Earth — How Long A Time Is That?"* 63 Calif. L. Rev. 601, 630.

[34]391 U.S. at 410.

[35]391 U.S. at 408.

Recently, the Court of Appeals for the Eighth Circuit interpreted the *Menominee* rule in the case of *United States v. White*, 508 F. 2d 453 (1974). The Eighth Circuit considered whether the Bald Eagle Protection Act had impliedly repealed a treaty right to hunt. The court concluded that:

> "[T]o affect those rights [by statute], it was incumbent upon Congress to *expressly* abrogate or modify the spirit of the relationship between the United States and the Red Lake Chippewa Indians on their native Reservations." (Italics supplied).

Finding no discussion in the Act's legislative history of the intended affect of this act on those specific treaty rights, the Eight Circuit held that the treaty rights had not been modified.

There is nothing in Public Law 83-280 and its legislative history that shows that Congress considered the specific treaty rights of the Yakima Indian Nation and intended to abrogate that specific treaty right. The contrary is true. Congress intended to exclude the Yakimas. All other objecting tribes were excluded, but since the Yakimas came from other than a listed state, no exclusion was written into the bill in the hurried drafting of Public Law 83-280. This will be further discussed at p. 35 herein.

At this time when this Nation is declaring its concern for human rights and self-determination throughout the world, and the expressions of the Executive

Branch and Congress support self-determination by Indian tribes, it would be appropriate for this court to clarify its *Menominee* rule by announcing that, since neither Public Law 83-280 nor its legislative history support an intention to effect specific Yakima treaty rights; that these Yakima treaty rights of self-government will not be modified or abrogated by this Act.

Likewise, Public Law 83-280 and its protegny R.C.W. 37.12.010 does not satisfy the constitutional duty of Congress to provide due process and equal protection to the Yakimas. The presumption is that Congress would not take such unconstitutional action.[36] This Court has recently made it clear in *Delaware Tribal Business Committee v. Weeks*, 429 U.S. ___ 97 S. Ct. 911 (1977); that the existence of plenary power of Congress in matters of Indian affairs does not mean that all federal legislation concerning Indians is immune from judicial scrutiny to determine whether due process or equal protection has been provided to the Indians involved.

> "The statement in *Lonewolf*, [citation omitted] that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the court of congressional power to abrogate treaties [citation omitted], has not detered this court, particularly in this day, from scrutinizing Indian legislation to

[36]If the state is required to follow the explicit wording of the statute, such a constitutional confrontation is avoided.

> determine whether it violates the equal protection component of the Fifth Amendment. [citations omitted]. "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute.' "
>
> "The standard of review most recently expressed is that the legislative judgment should not be disturbed as long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation towards the Indians." (97 Sup. Ct. at 918-919).

In *Weeks*, there was no "suspect class" as only "Indians" were involved. Likewise, no contention was made that there were any "fundamental interests" involved. Therefore, the majority was limited to the rational basis test in determining the constitutionality of distribution of judgment funds by Congress, saying that Congressional Acts, must be "tied rationally to the fulfillment of Congress' unique obligation towards Indians."[37] This Court has made it clear that the fulfillment of Congress' unique constitutional obligation towards Indians in the area of criminal jurisdiction is to protect them from others and from their own improvidence.[38] It is this protection of Indians upon which this particular power of Congress to legislate depends.[39]

[37]The concurring opinion appears to base its holding on the distribution being *reasonably necessary* to fulfill this congressional obligation. Judge Stewart's dissent is based upon his conclusion that Congress had failed to meet even the rational basis test.

[38]*United States v. Kagama,* 118 U.S. 372 (1903). This holding is still relied upon by this Court as late as *United States v. Wheeler,* ..... U.S. ....., 46 L. Week, (Opinion March 26, 1978).

[39]*Kagama, supra,* where this Court held that the power of Congress to legislate in this field wasn't the commerce power but that Congress' power rested *solely* on the *necessity* to *protect* Indians.

Since Congress made no showing of necessity of enacting Public Law 83-280 to protect the Yakimas, this Act does not possess a foundation to constitutionally sustain its authorization of Washington's unworkable system contained in R.C.W. 37.12.010. The hearings show that it was intended that the Yakimas be excluded.[40]

The corollary of this power of Congress to legislate to protect Indians is the duty of Congress to protect Indians. This duty of protection is a "fundamental right" of the Yakima Nation and its members.[41] The evidence is clear and convincing, that if Congress in adopting Public Law 83-280 authorized the system of law enforcement adopted by the State of Washington on the Yakima Reservation; Public Law 83-280 did not meet constitutional standards of equal protection and due process. Presumptively, Congress did not intend that result.[42]

Further, we have raised the question as to whether Congress can delegate to states the legislative and judicial power over Indians — where this legislative and judicial power is based upon the duty of the United States to protect Indians. The Legislative power of Congress is contained in Article I of The Constitution;

[40]Yak. App. I, p. *13.* Congress excluded every tribe that objected. However, since the Yakimas and the Colvilles were not from a listed state, during the hurried drafting of the Bill, they were not so excluded.

[41]We argue herein that the Yakimas are entitled to strict scrutiny because a "suspect class" and a "fundamental right" in involved. See pp.

[42]*Wright vs. Vinton Branch Bank,* 300 U.S. 440, 461 (1936).

"All legislative power herein granted *shall be vested* in a Congress of the United States, which shall consist of a Senate and a House of Representatives. (Emphasis supplied).

The judicial power of the United States is contained in Article III, Section 1;

"The judicial power of the United States shall be *vested* in one Supreme Court and such inferior courts as the Congress may from time ordain and establish. . . ." (Emphasis supplied).

By the passage of Public Law 83-280, Congress purported to delegate "vested" federal legislative and judicial function, based on the duty of the United States to provide internal protection for the Indian people, to the States without the consent of the governing body of the tribes involved. This Court has pointed out in *United States v. Kagama*, 118 U.S. 375 (1903), that Congress' power to legislate regarding internal affairs by Indian tribes is limited to that conferred by the Commerce Clause and by the federal duty to provide protection to Indians. In *Kagama*, this Court found that the protection of Indians constituted an *exclusive* national problem and referred to the practical necessity of withholding such power from the states:

"It seems to us that this [protection of Indians] is within the competency of Congress. These Indian Tribes are wards of the nation. They are communities dependent upon the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states and receive from them no protection. Because of the local ill feeling, the people of the State where they

are found are often their deadliest enemies. From this very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, *there arises the duty of protection, and with it the power.*" (Emphasis supplied).

It is conclusively demonstrated by this record, that this ill feeling and failure of the states to provide protection for Indians still exists. There is and can be no showing of the power of Congress to delegate this exclusive federal power to Washington.

Even if Congress could delegate to Washington this federal, judicial and legislative power, which is based on the duty to protect, and even if the Congress of the United States authorized Washington to assume this federal, legislative and judicial power without amending Article XXVI of the Washington State Constitution which disclaims this legislative and judicial power over Indian lands; such action would not meet the constitutional standards of due process of law. The Washington State Constitution and the Enabling Act by which the State of Washington became a member of the Union expressly disclaims jurisdiction over Indian lands.[43] Though proponents of state jurisdiction did attempt to remove this constitutional disclaimer[44] this action failed to even get the necessary legislative ap-

[43] *Washington Constitution*, Article XXVI, Yak. App. E. Enabling Act. Yak. App. D.

[44] 1955 Washington State Senate Journal, pp. 143, 184, 1082.

proval[45] and was not submitted to the people for approval as the Washington State Constitution requires.[46] The Washington State Constitution requirement that an amendment to the Constitution be passed by two-thirds of the legislature and be submitted to the people for majority vote is mandatory.[47]

If the Constitutional requirements of due process of law are to be satisfied, the Yakima Nation is entitled to the procedural safeguards against the unwarranted and unwise assumption of state jurisdiction over the Indian people on the Yakima Indian Reservation, by having this matter submitted to a two-thirds vote by the legislature and thereafter be submitted to the people of the State of Washington for their decision as required by the Washington State Constitution.

This Court has held that procedural safeguards must be satisfied to accord the constitutional standards of due process of law and this rule is applicable here.[48]

Again, it must be presumed that Congress did not authorize this unconstitutional action.[49]

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[45]Id.

[46]*Washington Constitution,* Article XXIII, Yak. App. F.

[47]*Washington Constitution,* Article I, Section 29. Yak. App. G.

[48]To your writer, it is fundamental that mandatory provisions of a constitution cannot be abrogated without amending a Constitution. It is likewise, as fundamental, that legislatures cannot abrogate the right of the people to vote on constitutional changes. Such principles are protected by this Court under the Fourteenth Amendment. *Duncan vs. Louisiana,* 391 U.S. 145 (1968).

[49]See notes 36, 48.

II.

THE STATE OF WASHINGTON HAS NOT COMPLIED WITH THE STATUTORY REQUIREMENTS OF PUBLIC LAW 83-280 IN ITS EXERCISE OF JURISDICTION

A. Failure to amend the disclaimer portion of Washington's Constitution.

The Enabling Act (Ch. 180, Laws of 1889, 25 Stat. 676), providing for the admission of the State of Washington, (among other states) to the Union; provided in Section 4 that Indian lands in the State of Washington should remain under the absolute control of the Congress of the United States. In Section 4, Congress expressed its will that the people themselves, not their representatives, should be the ones that made the determination regarding the matters contained in this section, stating "[a]nd said conventions shall provide, by ordinances irrevocable without the consent of . . . the people of said states: . . . That the people do agree and declare . . . [that] said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . ." Under this explicit mandate of the congressional Enabling Act, the people of Washington, through constitutional convention, incorporated this disclaimer of jurisdiction over Indian reservations into Article XXVI of the Washington State Constitution and provided it should be irrevoc-

able without the consent of the United States and *the people* of the State of Washington.[50]

Purporting to act in compliance with P. L. 83-280, Washington's 1963 Legislature unilaterally and over the strenuous objections of the Yakima Nation, assumed partial geographic and subject matter jurisdiction over the Yakima Indian Reservation.[51] Proponents of state jurisdiction had previously unsuccessfully sought to amend article XXVI to take jurisdiction over Indian Reservations. In 1963 these proponents followed a more expedient method, ignored the constitutional disclaimer and purported to assume this unilateral partial jurisdiction by mere legislative enactment. The Governor of the State of Washington raised the question as to whether this was constitutional, but signed the law asking that an early judicial determination of this question be obtained.[52] As pointed out by Washington, the majority of the Supreme Court of the State of Washington has made the determination that the Washington State Legislature can amend a mandatory, irrevocable portion of the Washington State Constitution without the consent "of the people," by mere legislative act. They ignored the mandatory amendment procedures of the Washington State Constitution and

[50]This language is taken from the dissenting opinion in *Tonasket v. Washington*, 84 Wn. 2d 192, 525 P. 2d 217.

[51]Chapter 36, Laws of 1963. Codified as RCW 37.12.010 et seq. App. 37-40.

[52]Infra, p. 9.

held the consent of the people of the state could be furnished by the legislature.[53]

Erroneous as this unusual interpretation of constitutional amending procedures may be, this Court's review is limited. This Court has the limited duty to determine whether Washington, in adopting its partial geographic and subject matter jurisdiction — without amendment of Washington's Disclaimer Clause — violated the statutory requirements of Public Law 83-280, Due Process or the Equal Protection Clause of the Fourteenth Amendment.

Washington, apparently recognizing the weakness of their position, did not deem it appropriate to fully brief this issue.

However, like the Solicitor General, we believe this substantial question warrants plenary consideration by this Court.[54] Washington's failure to amend the disclaimer clause in its Constitution, violates both the statutory requirements of Public Law 83-280 and the Equal Protection Clause of the Fourteenth Amendment. This is a threshold issue to the question of whether the partial geographic and subject matter jurisdiction exercised by the State of Washington within the Yakima Indian Reservation pursuant to Public Law 83-280, violates either the statutory requirements of Public Law 83-280 or the Equal Protection Clause of

[53]Washington's Brief, p. 30.

[54]Memorandum of United States, p. 9.

the Fourteenth Amendment. Violation of either federal requirement in total assumption by Washington would violate the same federal requirement in Washington's included partial geographic and subject matter assumption. This Court has held that a prevailing party may assert such grounds even though they were not relied upon by the Court below. *Dandridge v. Williams*, 397 U.S. 477 (1970).

State jurisdiction can only be validly asserted on the Yakima Reservation by leave of the United States. *Antoine v. Washington*, 420 U.S. 194, 205 (1975). Washington relies on Public Law 83-280 for such permission. Section 6 of Public Law 83-280 explicitly requires that Washington amend its constitution before assuming jurisdiction over Indian Reservations:

> "Provided, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such state until the people thereof have appropriately amended their constitution or statutes as the case may be."

This Court has not specifically considered the necessity for constitutional amendment by Washington, but it has considered the necessity of state compliance with Public Law 83-280 requirements, as amended, in *Kennerly vs. District Court*, 400 U.S. 423, (1971) and *McClanahan vs. Arizona Tax Commission*, 411 U.S. 164 (1973).

In *Kennerly*, this Court held that the "*procedures*"[55]

[55]400 U.S. at 429.

(this Court's emphasis) in Public Law 83-280, must be strictly followed before a state can assume jurisdiction. In *Kennerly*, notwithstanding the approval of the highest court of the applicable state *and* tribal approval; this Court held that actions of the state and tribe involved did not comport with the explicit requirements of Public Law 83-280.

McClanahan reasons that Public Law 83-280 expressly provides that the state may only assume state jurisdiction by removing its constitutional disclaimer.[56] To those who would argue that the states can assume jurisdiction over Indian country by simple legislative enactment, this Court said at 411 U.S. 177-78:

> "But we cannot believe that Congress would have required the consent of the Indians affected *and the amendment of those state constitutions which prohibit the assumption of jurisdiction if the states were free to accomplish the same goal unilaterally by simple legislative enactment.*" (Citing *Kennerly*. Emphasis added).

Both *Kennerly* and *McClanahan*, in which the validity of state jurisdiction had been upheld in state courts under state law, make it abundantly clear that the question of validity of state assumption of jurisdiction

[56]Though *McClanahan* was interpreting Public Law 90-284, it is controlling here. While Section 7 of Public Law 83-280 was repealed by Section 403(b) Public Law 90-284, the requirement of Section 6 regarding necessity for amending a constitutional disclaimer was retained in Section 404 of Public Law 90-284. This is probably an appropriate time to discuss Washington's peripheral claim that since there was a savings clause in Public Law 90-284 as regards Section 7, that this would ratify Washington's assumption. It is clear that it does not because Washington's assumption was under Section 6 of Public Law 83-280.

over Indians and Indian reservations is a federal question to be determined as a matter of federal law. They likewise determine, that under Public Law 83-280, a mere legislative enactment will not suffice where a state constitution contains a constitutional disclaimer of jurisdiction. These cases are controlling.

This question of assumption and the proper assumption of this delegation is dependent upon the proper *federal* interpretation of Public Law 83-280, a Federal Act. See: *Bryan vs. Itasca County*, ___ U.S. ___ 97 Sup. Ct. 2102 (1976); *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383 (1944).

The conclusion of Washington's Supreme Courts in *Tonasket v. State*, 84 Wn. 2d 164, 525 P.2d 744; *Comenout vs. Burdman*, 84 Wn. 2d, 192, 525 P.2d 217; *Makah Indian Tribe v. State*, 76 Wn. 2d 485, P.2d 590 (1969), and *State v. Paul*, 53 Wn. 2d 789, 337 P.2d 33 (1959), that legislative assumption of Indian jurisdiction was valid under state law, is not controlling. The Circuit Court of Appeals for the Ninth Circuit reliance on the State interpretation in *Quinault Tribe of Indians vs. Gallagher*, 368 F.2d 648 (1966) and *Dixon vs. Rhay*, 396 F.2d 760 (9th Cir. 1968), is in error. The triggering event for state assumption specified by Congress is amendment of the state constitution, and that *explicit federal statutory* requirement transcends any state interpretation.

The plain reading of the Proviso in Section 6 of Public Law 83-280 requires the Amendment of Article XXVI of the Washington State Constitution to meet the statutory requirements of the Act. Should this Court believe that ambiguity exists, an outline of this Court's rules regarding interpretation of Public Law 83-280 is in order."

In interpreting Public Law 83-280, this Court "must be guided by that eminently sound and vital cannon, that statutes passed for the benefit of dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan vs. Itasca County*, 426 U.S. 373 (1976).

"[T]he primary concern of Congress in enacting Public Law 280 that emerges from its sparse legislative history was the problem of lawlessness on certain Indian Reservations, and the absence of adequate tribal institutions for law enforcement." *Bryan*, supra.

In its interpretation, this Court relies on Congressional discussion, *(Bryan*, supra; *United States v. CIO*, 335 U.S. 106 (1948); Reports of Legislative Committees, *(Bryan*, supra; *Harrison vs. Northern Trust*, 317 U.S. 476 (1943); legal opinions prepared for the sponsors and congressional committees, *Helvering vs. Grif-*

[57]In addition to the rule that the face of the statute will control is the rule that the face of the statute is still the foremost guide to legislative intention even when it is not conclusive. *United States v. Oregon*, 366 U.S. 643, 648 (1961). *Schwegmann Bros. vs. Calvert Distillers, Corp.*, 341 U.S. 384, 390-5, (1951).

fiths, 318 U.S. 371 (1943). Congress' concern about the continuing vitality of tribal governments. *(Bryan*, supra), and subsequent treatment by Congress. *(Mattz vs. Arnett*, 411 U.S. 481 (1975).

With this Court's applicable rules of statutory construction firmly in mind, we now examine the legislative history of Public Law 83-280.

Fortunately, the precise constitutional thinking of the Committee on Interior and Insular Affairs of the House of Representatives which shaped Public Law 83-280 is available to provide this Court with the rapid and summary step by step evolution of the Act. These hearings were filed by the United States in *Tonasket vs. Washington*, 411 U.S. 451 (1973) and for the Court's convenience are reproduced in Appendix I to this brief.[58]

The evolution of §6 and §7 of Public Law 83-280 can best be ascertained from the informed congressional discussion in the July 15, 1953 Hearing of the Senate Committee on Insular and Interior Affairs. Mr. Abbott, Counsel to the committe, first stated:

" . . . The bill does not, as acted upon by committee make provision for eight states which have constitu-

[58]These Hearings are cited herein as "July 15, 1953 Committee Hearings on HR 1063" and "June 29, 1953 Sub-Committee Hearings on HR 1063.

Considering the importance of this legislation to treaty reserved rights of self-government, the shortness of time involved in these hearings is shocking. However, the House outdid the Senate. The Senate merely adopted the House Report and moved the House's Bill within five days from House passage. Certainly not a very good record for a body who classifies itself as a "great deliberative body."

tional organic impediments for accepting state jurisdiction. The Enabling Act for Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah and *Washington* provided that *exclusive* Federal jurisdiction would be retained.

"The Indian Bureau in listing states pointed out that those eight states now have organic law impediments in their constitutions or other laws which would not enable them to take on state jurisdiction"

. . .

"I have handed to Mr. Young a proposed amendment which would provide for the granting of consent to states having organic law impediments. At such time as they remove those impediments *by action of the people in the state*, they could then take over the exclusive civil criminal jurisdiction over Indians and Indian matters.

"*In addition, Mr. Westland's state* [*Washington*], which *is one state which has a constitutional impediment, the one section provides for removal by the state of constitutiona' impediments.* The other section would apply to any other of the 15 Indian states, so that they, by affirmative legislative action, could assume either criminal or civil jurisdiction, or both, at such time as the matter were laid before the legislative bodies.

"In short, the legislation as acted upon by the *committee would apply to only five states.* The two additional section amendments would apply *first to the eight states having constitutional or organic law impediments* and would grant consent of the United States for *them to remove such impediments* and thus acquire jurisdiction.

"The *other amendment* [Section 7] would apply to *any other* Indian state, some 15 or 18, who would acquire jurisdiction at such time as the legislative body affirmatively indicated their desire to so assume jurisdiction." (Emphasis supplied). July

15, 1953 Committee Hearing on H. R. 1063, folio 2-4, Yak. App. I, pp. 22-24.

So it can be seen that in order to allow the bill to operate nationwide, the legal analysts who drafted the bill recognized that two different amendments would have to be made to provide for differing legal problems in two distinct sets of optional states.

The two amendments with sharply contrasting language must be studied carefully.

> "Sec. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.
>
> "Sec. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the state shall, by affirmative legislative action, obligate and bind the State to assumption thereof." (Public Law 83-280, 67 Stat. 588 at 590).

Mr. Abbott's bald statement that §6 and not §7 governs Washington, makes Congress' intent very clear. But the matter does not end there. The conclusion is bol-

stered in the Senate and House Committee Reports on H. R. 1063 which read in part:

> "Your committee has amended the printed bill by adopting substitute language which operates to —
>
> . . .
>
> "(2) give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment *by amending or repealing such disclaimer laws.*
>
> Examination of the Federal statutes and State constitutions has revealed that enabling acts for eight states, and in consequence the constitutions of those States contain express disclaimers of jurisdiction. Included are Arizona, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, and *Washington. Effect of the disclaimer* of jurisdiction over Indian land within the borders of these States — in the absence of consent being given for future action to assume jurisdiction — is to retain exclusive Federal jurisdiction until Indian title in such lands is extinguished; such States could, under the bill as reported, *proceed to amendment of their respective organic laws by proper amending procedure.* (Emphasis supplied). (U.S. Code Cong. and Ad. News, 1953, 83rd Cong. at 2412; 99 Cong. Rec. 10782, August 1, 1953).

The constitutional amendment requirement is placed beyond any reasonable doubt by colloquy on the floor of the Senate:

> "Mr. Case: . . . It is noted that the bill refers specifically to California, Minnesota, Nebraska, Oregon and Wisconsin. It is my understanding that the bill also contains a couple of paragraphs which make it possible for States which by their compact with the United States, or, in some cases, their con-

stitution, ceded jurisdiction with respect to Indian lands to the United States, *to amend their constitutions so as to come under the provisions of the bill.* I have in mind, of course particularly the situation in South Dakota and *Washington* under the identical enabling act. I understand that the same situation obtains in Montana, North Dakota, and possibly Wyoming.

. . .

"Mr. Barrett: Mr. President, the Senator from South Dakota is correct." (Emphasis supplied). 99 Cong. Rec. 10782 (August 1, 1953).

Congress' intent in Public Law 83-280 is detailed (1) by the sponsors of the act, (2) in congressional hearings, (3) in Senate and House Reports, and (4) in Senate floor debate. *All agreed unanimously that §6 and not §7 govern Washington.*

We now reach the second question facing this Court. What is the meaning of §6 of Public Law 83-280? Close analysis is necessary.

Section 6 begins:

"Notwithstanding the provisions of any Enabling Act for the admission of a state . . ."

and then grants federal consent to amendment of the applicable constitution.

The addition of the initial amendatory language is explained by colloquy in the Committee Hearing on H.R. 1063.

"Mr. Berry: Mr. Chairman, I would like to ask a question. Would it be better to word that to say that this 'shall be applicable,' instead of saying 'consent is hereby granted.' Why not say 'The provisions of the law shall be applicable' to these states

wherein they do these things.

"Mr. Westland: I believe the law would then be applicable to them, once they had taken this affirmative action.

"Mr. Rhodes: Will the gentlemen yield. *You cannot very well allow enabling legislation to be amended merely by giving consent. There has to be specific legislation.*

"Mr. Dawson: That brings up another question: Whether your wording should refer to the Enabling Act. You say 'We hereby give our consent for them to amend their state constitution.' Their state constitution was based upon the Enabling Act. In other words, they followed that. I wonder whether we should have something in there to say 'Notwithstanding any restrictions in the Enabling Act, consent is hereby given to amend their state constitution.'

"Mr. Abbott: (Counsel) I believe that clause 'notwithstanding any provision of the Enabling Act' for such states might well be included. *It* would *make clear that Congress was repealing the Enabling Act.*

"Mr. Dawson: *To give permission to amend their constitution.*"

(Emphasis supplied). July 15, 1953 Committee Hearing on H.R. 1063, folio 8, and 9, Yak. App. I, pp. 26-27.

When Congress did act favorably on the legislation its intent to amend the Enabling Act for the *limited* purpose of allowing constitutional amendment, became law. But it must be firmly kept in mind that the Enabling Act amendment was only *conditional* and would only become operative by virtue of state constitutional amendment. The provision of §6 underscores this conclusion:

" . . . *Provided*, That the provisions of *this* Act shall not become effective . . . *until* . . . " (Emphasis supplied). Stat. 588 at 590.

Thus, Congressional consent in §6 of Public Law 83-280 to state assumption of Indian jurisdiction depends upon amendment of the applicable constitution. This twofold conclusion of Congress' intent is spelled out in the Committee Hearings on H.R. 1063.

"Mr. Berry: Does not this make this bill applicable to all states who do amend their laws under the constitution, and it greatly increases the authority of the bill.

"Mr. Abbott: (Counsel) The intention was to grant it to all states at such time as they were willing to take it. The five states we have named have been consulted with by the Indian Bureau. *Any other time in the future that the State of Washington or South Dakota is able to remove their constitutional impediments, they could so do it . . .*

"Mr. Westland: I believe the State of Washington was consulted on this mater and they indicated their readiness to take over on this jurisdiction as far as criminal and civil was concerned, but they do have a constitution there that requires this amendment [referring to §6] in order that they can get at it." (Emphasis supplied). July 15, 1953 Committee Hearing on H.R. 1063, folio and 7 and 8, Yak. App. I, pp. 25-26.

Then the Committee began consideration of §7 which provides Indian jurisdiction for any of the other eighteen optional states with Indian populations,

" . . . at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the state to the assumption thereof." 67 Stat. 588 at 590.

The contrast between the language of §6 of Public Law 83-280 authorizing "the people of any state to amend . . . their state constitution" and that of §7 of Public Law 83-280 providing that "the people of the State shall, *by affirmative legislative action*" points up quite forcefully Congress' intent that the triggering event for state assumption in Washington would be a constitutional amendment and not a statute enacted by the legislature. The point was driven home once and for all in the June, 1953 Indian Affairs Subcommittee Hearing on H.R. 1063 at which Harry A. Sellery, Chief Counsel for the Bureau of Indian Affairs, and William R. Benge, Chief of the Branch of Law and Order of the Bureau of Indian Affairs, presented the version of the bill that would extend its effect outside of California.

"Mr. Abbott: (Counsel to Committee) Mr. Benge informs me that there are 26 states shown there as having Indian populations. You can correct it for the record. Mr. Benge, but I believe several of those states have constitutional prohibitions against jurisdiction.

"Mr. Benge: Yes, sir; that is right.

"Mr. Abbott: Which would mean that there would be apparently no jurisdiction.

"Mr. Benge: It would require amendment to a state constitution in most cases, on the ones that Mr. Abbott is speaking of. The Organic Act which admitted the state to the union and the state constitution would have to be amended. The state constitution in consequence of the Organic Act denied jurisdiction over crimes committed by Indians on their reservations. *To meet that the State Legislature would have to amend the constitution.*

"I take it that a general bill like this would be regarded as authority by the Congress for them to amend their constitutions. It would be regarded as an amendment to the Organic Act.

"Mr. Aspinall: *The State Legislature would not do it. The people of the state themselves would have to do it.*

"Mr. Benge: *Yes, sir.*" (Emphasis supplied) June 29, 1953 Sub-Committee Hearing on H.R. 1063, folio 23-24, Yak. App. I, p. 27.

This again effectively demonstrates Congress' intent that §6 of Public Law 83-280 authorizes Washington to assume Indian jurisdiction not by mere legislative action but only conditionally upon amendment of this constitution by the people of the state.

One difficulty remains, however, §6 of Public Law 83-280 authorizes amendment of the constitution "or existing statutes . . ." Does that not mean that simple legislation action without constitutional amendment is alternatively authorized by §6 for Washington? Are §6 and §7 interchangeable in some cases?

Such an interpretation will not do. First, it would make §6 and §7 equivalent, and therefore §7 totally redundant in blatant violation of the maxim of avoiding redundancies. Second, this Court favors another reasonable interpretation if permissible, *United States v. Landram*, 118 U.S. 81 (1886). Another interpretation is permissible. It is required by the Eighty-Third Congress' clear legislative purpose to the contrary. Finally, and providentially, the very problem occurred to Con-

gressman Wesley A. D'Ewart of Montana during committee deliberations.

"Mr. Westland: This amendment would insert two new sections. First is section 6, which says: 'The consent of the United States is hereby given to the people of any state to amend where necessary their state constitutions o rexisting statutes" . . .

"Mr. D'Ewart: *I do not think we have to grant permission to a state to amend its own statutes.*

"Mr. Abbott: (Counsel) Mr. D'Ewart, I believe *the reasons for that is that in some instances it is spelled out both in the constitution and the statutory provisions as a result of the Act and it may be unnecessary, but by some state courts it may be interpreted as being necessary.*" (Emphasis supplied) July 15, 1953 Committee Hearing on H.R. 1063, folio 6, lines 18-22, folio 7, lines 5-11, Yak. App. I, p. 25-26.

The grant of permission to amend statutes in §6, then, is an extra measure of consent to states with disclaimers of Indian jurisdiction in their constitutions and in their statutes as well. Such consent to statutory amendment is intended to be *in addition* to constitutional amendment even though possibly "unnecessary", and is decidely not intended to provide an alternative to constitutional amendment. The unusual states with statutory as well as constitutional disclaimers of Indian jurisdiction are Oklahoma, North Dakota, and South Dakota. The extra measure of consent to amend statutes in §6 is limited to those three states. Washington has *no* such statute.

The Washington State Constitution expressly dis-

claims jurisdiction over Indian lands. Though proponents of state jurisdiction did unsuccessfully attempt to remove this constitutional disclaimer, this action failed to even get the necessary two thirds legislative approval and was not submitted to the people for approval as the Washington State Constitution requires. It is also to be noted that in neither the enactment of Chapter 240, Laws of 1957, nor Chapter 36, Laws of 1963 (R.C.W. 37.12) which only required a majority vote, did the legislature indicate that the constitutional disclaimer be amended, revoked or that the people of this state gave their consent to the revocation of its provisions. These ignored provisions of the Washington State Constitution are mandatory."[59] Even if this legislative action satisfies Public Law 280's requirements, it would not afford the Yakimas substantial due process of law.

Washington has not complied with the statutory requirements of Congress as specified in Public Law 83-280 or the Fourteenth Amendment when it failed to amend Article XXVI of Washington's Constitution.

The Fourteenth Amendment requires that the Yakimas would have the opportunity to present the amendment question to the people of this state in a "meaningful" (by constitutional procedures) manner. *Goldberg vs. Kelly*, 398 U.S. 254 (1970); *New Jersey vs. Wilson*, 7 Cranch 164 (1892).

[59]*Washington Constitution*, Article I, Section 29.

B. Washington's partial geographic and subject matter assumption does not meet the statutory requirements of Public Law 83-280.

Public Law 83-280 ceded to certain listed states full criminal jurisdiction over listed "Indian country" within the state's boundaries, to the exclusion of federal jurisdiction effective immediately and without any requirement of action by the state or the affected tribes. Neither, as originally enacted, or as later amended, did this "automatic" jurisdiction provision apply to the State of Washington. However, the terms of Sections 2a of Public Law 83-280 is relevant in construing the "optional" jurisdiction provisions which Washington seeks to invoke. Where "automatic" jurisdiction is ceded over "offenses committed by or against Indians," it is to be exercised "to the same extent othat such state . . . has jurisdiction over offenses committed elsewhere within the state . . .; that "the criminal laws of such state . . . shall have the same force and effect within such Indian country as they have elsewhere within the state . . ." (18 USC 1162(a)); and that the special federal criminal jurisdiction provisions including the major crimes act are henceforth inapplicable (18 USC 1162(c)).[60]

With this preamble, we examine the provision of Public Law 83-280 which is directly applicable to

[60]Sections 2a and 2c of Public Law 83-280. Yak. App. G. See also 4a, Public Law 83-280.

Washington. Section 6, it is agreed, covers Washington's conditional right to assume jurisdiction; authorizes Washington to "amend, where necessary, their state constitution or existing statutes, as the case may be, to remove any legal implement to the assumption of civil and criminal jurisdiction *in accordance with the provisions of this Act.*" Since the provisions of this Act in Section 2(a) and 4(a) provides that jurisdiction must be to "the same extent" and have the "same force and effect" within Indian country as Washington exercises elsewhere within the state, the face of the Act is controlling in this case.

The Legislative history on Public Law 83-280 is supportive of the congressional intent contained on the face of the Act. In this regard, the five judge dissenting opinion (J.S. pp. 47-59) to the *en banc* decision below, regarding Washington's partial assumption; is persuasive. Yakima relies on the reasoning contained therein but does not repeat it in this brief. Our discussion herein will be supplemental to that opinion.

Additionally, the Subcommittee hearings in toto clearly demonstrate it was not contemplated that Washington would pass a statute assuming partial jurisdiction. Indeed, it was not contemplated that they would pass a statute. The hearings demonstrate that the exercise of Washington's option, to assume jurisdiction, was to be by amendment of the disclaimer article of its Con-

stitution. The Committee intended that when Washington's exclusive method for assumption was exercised that Washington's jurisdiction over Indians and civil and criminal matters would be *exclusive:*

> Mr. Abbott (Counsel): "I have handed to Mr. Young a proposed amendment [Section 6] which would provide for the granting of consent to states having organic law impediments [Washington]. At such time as they remove those impediments by the people in the state, they could then take over the *exclusive* civil and criminal jurisdiction over Indians and Indian matters." July 15, 1953 Committee Hearings. Folio 3. Yak. App. I, p. 23 (Emphasis supplied).[61]

This Court has previously examined Congressional intent regarding a "checkerboard" system of justice in *Seymour v. Superintendent*, 368 U.S. 351, 358 (1962) and could see "no justification for adopting an unwarranted construction . . . where the result would be merely to recreate confusion Congress specifically sought to avoid."

In its *en banc* decision, (J.S. pp. 38-47) a seven judge majority for the Court of Appeals for the Ninth Circuit, was not so constrained. The majority did not reach the question of whether partial assumption would be justified under Public Law 83-280. They read Wash-

[61]This statement carries great weight in this Court's deliberations. *Wright v. Vinton Branch Bank,* 300 U.S. 440, 463-463 (1936); *United States v. United Mine Workers,* 330 U.S. 258, 278-280 (1947); *Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 474-475 (1921); *Chicago, M., St. P. and P.R.R. vs. Acme Fast Freight,* 336 U.S. 465, 472-477 (1949); *Mitchell v. Kentucky Finance Co.,* 359 U. S. 290, 293-295 (1959); *National Woodwork Manufacturers Association v. Labor Board,* 386 U.S. 612, 639-640 (1967).

ington's partial geographic and subject matter assumption statute as total assumption of jurisdiction subject to a condition precedent that the tribe request total jurisdiction. We think that this court will find the five judge dissent to this *en banc* decision more in line with this Court's previous determination.

The fallacy of the majority reasoning appears within the four corners of the *Quinault II holding*.[62] *Quinault* II, says that RCW 37.12.010 is *total* assumption, and if you want *total* assumption, petition the governor. This reasoning is likewise in error outside of the four corners of the opinion. This court in *Kennerly* (400 U.S. at 427), held that Public Law 83-280 "made no provision whatsoever for tribal consent." *Kennerly*, therefore, is inconsistent with the reasoning of the *en banc* majority and *Quinault II*. In any event, it takes some stretch of reasoning to say that the Yakima Nation, which does not want and has protested state jurisdiction, and has not received adequate services under the Washington partial jurisdiction scheme on a reservation where over 80% of the reservation is in trust status, is under total state jurisdiction. Washington itself, at page 41 and 42 of its brief, acknowledges that Washington chose to take less then total jurisdiction over the Yakima Nation.

[62]*Quinault v. Gallagher*, 386 F. 2d 655, (9th Cir. 1966). The *en banc* opinion designates this opinion as *Quinault II*. We borrow that designation.

The District Court below on Washington's insistence has held and Washington's Attorney General has ruled that Sections 2(a) and 4(a) of Public Law 83-280 requiring jurisdiction to be to the "same extent" and the laws have the same "force and effect" as they have elsewhere in the state are applicable to the State of Washington.[63] Washington now argues that Section 7 of Public Law 83-280 is the applicable portion. Washington's reasoning fails for other reasons than inconsistency. The legislative history is clear and the face of §7 limits that section "to any other state" not covered by §6 or specifically listed. Washington's contention is therefore not valid.

While minority opinion in the *en banc* decision of the Court of Appeals of the Ninth Circuit is persuasive regarding the partial assumption of state jurisdiction by Washington, we do not agree with the dissent's opinion that under Congress' specific direction in §6 that an assumption of reservation by reservation is permitted by Public Law 83-280. We would agree that this is probably the best way to handle assumption. Under this Court's previous rulings, it is the only way that Congress can constitutionally authorize state

[63]1965 Washington's Attorney General's Opinions, No. 68, where the Attorney General opined that Washington's jurisdiction over Indians was exclusive based on the portion of Public Law 83-280 that provided that the State's must assume jurisdiction over Indians to the same extent and the same manner as it does elsewhere within the state.

assumption over the Yakima Reservation.[64] However, the general intent of Congress will not control the requirements specified in Public Law 83-280.

In its partial geographic assumption, Washington determines what portion of the Yakima Indian Reservation is Indian country." Since 18 USC 1151, which is contained in the portion of title 18, that Public Law 280 seeks to amend, defines "Indian country" to be the entire reservation notwithstanding "the issuance of any patent"; Washington's action is foreclosed by the face of the Act. Even if this action were not barred by the face of the Act, Washington's partial geographic assumption is foreclosed by Public Law 83-280's legislative history and this Court's holdings. The burden is not upon the Yakimas to show that Congress did not intend for the State to take such action. This Court has made it clear in *Mattz v. Arnett*, 412 U.S. 481 (1973), that such a congressional determination must be affirmatively expressed "on the face of the Act or be clear from the surrounding circumstances and legislative history."[65] Washington has the burden and cannot meet it.

Washington places great reliance on Interior's Report in subsequent legislation to sustain their burden

[64]To abrogate the treaty right of self-government, as we have herein discussed, Congress must deal with each treaty specifically.

[65]412 U.S. at 504-505. Citing *United States v. Celestine*, 215 U.S. 278 (1909), *Seymour v. Superintendent*, 368 U.S. 351 (1962) and *United States v. Nice*, 241 U.S. 591 (1916).

of a clear showing of legislative intent. In asking this Court to rely on subsequent departmental interpretations, they cite *Shapiro v. United States*, 335 U.S. 1 (1947) and *U. S. v. Jackson*, 280 U.S. 183 (1930). These decisions are inapposite to Washington's position. In *Shapiro*, the Departmental interpretation was not during hearings on subsequent legislation, but was during hearings on the Act involved. We would agree that departmental testimony or reports on Public Law 83-280 are entitled to consideration by this Court in determining Congressional intent. However, since this Court in *Mattz v. Arnett* has determined (412 U.S. at 505, note 25) that subsequent legislation usually is not entitled to much weight in construing earlier statutes; we do not believe that this Court would wish to place much reliance on testimony or reports in subsequent legislation that have even less weight.

However, since the State's entire case is tied to materials in the record of the legislative history of the Indian Civil Rights Act and predecessor bill and is misleading, it would appear that analysis of the legislative history of the 1968 Indian Civil Rights Act must be undertaken. In the Indian Civil Rights Act,[66] enacted as a rider to the Civil Rights Act of 1968,[67] Congress faced a number of problems involved in the relationship

[66]Codified at 25 USC §1301-05, 1311-12, 1321-27, 1331, 1341.

[67]Pub. L. 90-284, 82 Stat. 73. Portions not relating specifically to Indians codified in scattered sections of Title 18, 25, 42 U.S.C.

between the various Indian tribes and the States under Public Law 83-280. The product of that legislative history regarding Public Law 83-280 is Title IV of the Civil Rights Act of 1968.[68] In considering this history, it is acknowledged that the Indian Civil Rights Act may not have a mother. It was produced artificially in the incubator of the serious civil rights turmoil of the late 1960's. However, this Act and Title IV has an acknowledged father. The acknowledged father is Senator Sam Erwin of North Carolina. Therefore, his intent and the intent of the Subcommittee on Consitutional Rights chaired by Senator Erwin merits special attention.[69]

In the early 1960's, Senator Sam Erwin's Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary initiated a public inquiry to determine whether immunity from Constitutional restraint had resulted in actual deprivation of Constitutional rights of Indians.[70]

Hearings were held in 1961, 1962, 1963, and 1965. From early hearings emerged a broad picture of constitutional neglect of the Indian people which Senator Erwin was determined to remedy. The Subcommittee's conclusions are contained in the *Constitutional Rights of American Indian Summary Report of Hearings and*

[68]Sec. 401 through 406, Pub. L. 90-284.

[69]A complete analysis can be found in 9 Harvard Journal on Legislation 557. Burnett, *An Historical Analysis of the 1968 Indian Civil Rights Act,* hereafter cited as "Burnett".

[70]Burnett at 577.

investigations by the Subcommittee on Constitutional Rights.[71] In that summary, the Subcommittee found:

> "During the Subcommittee's investigation, a substantial number of witnesses charged that the enactment of Public Law 280, conferring jurisdiction on various states, had resulted in such a breakdown in the administration of criminal justice in some states that many of their Indian citizens were being denied due process and equal protection of the law." Summary, p. 9.

and the Subcommittee recommended:

> "6. The consent of the United States should be given to any state to assume, in whole or in part, criminal and civil jurisdiction over Indian reservations, provided that the Indian tribes involved consent. The Congress should further authorize the United States to accept retrocession by any state of any civil or criminal jurisdiction." Summary p. 23.

Following this report to Congress on February 2, 1965, Senator Erwin introduced Bills S.961-968 and S. J. Res. 40 to fulfill the Subcommittee's recommendations. Among those bills was S.966 which was to cover recommendation 6. above. In introducing S. 966, and as a statement during the hearings on S.966, Senator Erwin said as follows:

> "Public Law 280, which confers to certain states, civil and criminal jurisdiction over Indian country, was found by the Subcommittees' investigation to have resulted in a breakdown in the administration of justice to such a degree *that Indians are being denied due process and equal protection of the law.*

[71]Filed in 1964, by the Subcommittee hereinafter cited as "Summary."

> Some states claim that Public Law 280 imposes too great a financial burden and that subsidies from the federal government are needed if the states are adequately to enforce law on the reservations. In addition, some states indicate that a piecemeal session by the federal government of jurisdiction over Indian country would be more feasible." (111 Cong. Rec. 1784 (1965) 1965 Hearings, p. 4)[72]

Interior's Report on S.966, dated June 19, 1965, shows that the Department of Justice and the Department of Interior considered this a significant change in Public Law 83-280:

> "We think, however, that the *extension of criminal jurisdiction to the states on a piecemeal basis needs to be considered further.* The Department of Justice has indicated that this approach in the criminal area is undesirable. Such an *extension* of jurisdiction may result in unnecessary confusion in the enforcement of criminal statutes and in the administration of Indian affairs." (1965 Hearings at 320). Emphasis supplied.

In 1967, Senator Erwin reintroduced S.966 as S.1885. Senator Erwin maintained his resolve to repeal Section 7 of Public Law 280 and added the requirement that tribal consent had to be demonstrated by referendum. No change was made regarding authorization of piecemeal assumption. (113 CONG. REC. 13473-78 (1967)). It was during the hearings on this bill that the Department of Interior through its Assist-

[72]Hearings on Constitutional Rights of American Indians, Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. 89th Congress, 1st Session (1965). These hearings and similar hearings before this Subcommittee will be designated by the year of the hearings. "1965 Hearings."

ant Secretary, Harry Anderson, filed the report upon which the State now relies. In this report, filed both before the Senate Committee and the House Committee, Assistant Secretary Anderson expresses the view that authority for piecemeal assumption "is *now implicit* . . . "because the *present* law permits the states to assume partial jurisdiction." (Emphasis supplied). Considering the fact that the holding in *Quinault II* was then unchallenged, we do not believe that this is any authority for partial assumption under Public Law 83-280 *as enacted.* In any event, the Congress of the United States in adopting S.1885 as an amendment to the basic Civil Rights Act of 1968 shows that Congress considered Title IV Public Law 90-284 to be a change in the existing law.

In addition to congressional intent that Washington's assumption under Public Law 280 was total, the face of the Act, says that state assumption shall be over "Indian country." As previously discussed, "Indian country" was already defined by Congress to be the entire reservation "notwithstanding the issuance of any patent."[73] The legislative history shows that definition to be firmly in the minds of Congress.

> "Mr. Saylor. Also what Indian country you would recommend, whether all Indian country within the State or whether certain parts of the Indian country can be excepted.

[73]18 USC 1151.

> "Mr. D'Ewart. The phrase "Indian country" is already defined by law and has a very distinct meaning. It is defined in the recodification statutes adopted a very few years ago, and it is very clear." June 29, 1953 Sub-Committee Hearings, Folio, p. 6, Yak. App. I, p. 5.

The prohibition of partial geographic assumption is clear from the face of the Act in the two seperate dscussed areas, and the legislative history clearly shows that partial geographic assumption was not contemplated. The face of the Act and legislative history not only fail to sustain Washington's burden, but they disprove Washington's contention.[74]

III.

Washington's partial geographic assumption does not satisfy Constitutional Equal Protection Requirements.

The Court of Appeals, following this Court's guidelines in *Massachusetts Board of Retirement v. Muguira*, 427 U.S. 307 1976); *Reed v. Reed*, 404 U.S. 71 (1971); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969); and *McGowan vs. Maryland*, 366 U.S. 420 (1961); held that Washington's title-based classification fails to meet any formulation of the rational basis test and violates the Equal Protection Clause.

Washington has abandoned its previously stated purpose and now contend that the purpose of Wash-

[74]The state has the burden. *Deleware Business Council v. Weeks*, *supra*.

ington's partial assumption system was to recognize the Yakimas desire for self-government and to recognize the historical and cultural status of trust lands (Washington's brief, pp. 32-39). This purpose is not supported by the record and indeed Washington states this purpose for the first time. Washington's position, in other cases in which we are involved, has been that Washington cannot treat Indians different in enacting or promulgating a state regulatory scheme. That has been Washington's position as late as this year, as the Court of Appeals reports in its April 24, 1978 consolidated decision in *Puget Sound Gillnetters Association, et. al. vs. United States District Court*, No. 77-3129; *Columbia River Fishermans Protective Union, et. al. v. United States District Court*, Nos. 77-3208 and 77-3209, and *United States of America, et. al. vs. State of Washington, et. al.*, Nos. 77-3654, 77-3655, ___ F. 2d ___ (9th Cir., April 24, 1978):

> "The State [Washington] and non-Indian fish catchers argue that to treat Indian fish catchers differently from non-Indians in allocating fishing opportunities and determining fishing regulations is a patent violation of basic equal protection principles. The Washington State Courts have accepted this argument. See *Washington State Commercial Passenger Fishing Vessel Association vs. Tollefson*, 89 *Wash.* 2d 276, 571 P. 2d 1371 (1977)."

Of course, Washington was incorrect in its position and the Circuit Court so held, but this continued contention on Washington's part brings little credibility

to the proposition that the newly stated purpose was Washington's purpose in enacting R.C.W. 37.12.010. In any event, the newly stated purpose does not satisfy this Court's rational basis test.

Massachusetts Board of Retirement v. Murgia, 427 U.S. 37 (1976) is a recent decision of this Court that limits this Court's equal protection standard for determining constitutionality of a state statute that (a) neither disadvantages any suspect class nor (b) infringe on any fundamental interest — to a rationality test.

Reed vs. Reed, 404 U.S. 71, 75-76, provides this Court's appropriate formulation for this test:

> "[T]his Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. [citations omitted]. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.' "[75]

Washington's stated purpose for partial geographic and subject matter assumption does not meet this minimum test. Though Indians can be a permissible clas-

[75]The unusual deference in *McDonald, supra* and *McGowan, supra* has been tightened by this Court's subsequent unanimous decision in *Reed, supra*.

sification, this does not keep the Washington partial geographic and subject matter assumption from violating constitutional standards. Within this Indian class, R.C.W. 37.12.010 establishes several sub-classifications. The first sub-classification, is that only members of the Yakima Nation are considered to be in the Indian classification.[76] The second sub-classification, is the classification of whether the incident took place on non-trust or trust lands.[77] The third sub-classification are the eight subject matter categories listed in R.C.W. 37.12.010.[78] Within these eight category sub-classifications is the further sub-classification between adults and juveniles.[79] All of these sub-classifications must meet the formulation of rational purpose set forth in *Reed, supra*.

Washington faced with the impossible task of providing a rational basis for these classifications and sub-classifications, begs the question by stating that Washington's jurisdictional system is no less rational than the federal jurisdiction system which this Court upheld in *United States v. Antelope*, 430 U.S. 641 (1977). Their analysis of *Antelope*, is superficial. This Court's holding in *Antelope* is that since all parties subject to the applicable laws were treated in an "evenhanded

[76]See Note 16.
[77]R.C.W. 37.10.010.
[78]Id.
[79]Id.

manner", the Fourteenth Amendment was not violated.

The permissible purpose of state assumption under PL 83-280 is to provide for the protection of the person and property of the Indian people. This Court found the specific "primary concern of Congress in enacting Public Law 280, that emerges from its sparse legislative history, was the problem of lawlessness on certain Indian reservations." *Bryan, supra.* Washington's unreasonable, arbitrary, unworkable, discriminatory, unequal system does not foster that purpose and fails to meet even the most liberally construed test of rationality.

The Yakimas do not stop here in their attack on Washington's unconstitutional system. R.C.W. 37.12.010 (a) disadvantages a suspect class and (b) infringes on a fundamental interest. In discussing "suspect class" and "fundamental rights" the Yakimas are operating in the belief that these constitutional ideals are expressed by this Court in "judicially discoverable and manageable standards." *Baker vs. Karr,* 369 U.S. 186, 217 (1962).

In defining a "suspect" class, this Court has operated on the historically correct premise that traditionally the place of preeminence belonged to the affluent, white, Anglo-American male. This Court has likewise correctly discerned that historically at the other end of the spectrum was discrimination on the basis of race.

In the graduations in between, this Court, not unnaturally in its concern not to unduly interfere with other branches of government, has experienced some difficulty. In making this determination, this Court's classic standard definition, first enunciated in *United State v. Caroline Products Co.*, 304 U.S. 144, 153n.4 (1968) has been often relied on. That definition is that a suspect class must be a "discrete and insular minorit[y]." To this classic description, Justice Brennen's plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), suggests three further relevant factors: (1) that suspect classes suffer from "an immutable characteristic determined solely by the accident of birth" which "bears no relation to ability to perform or contribute to society;" (2) that suspect classes have suffered "historical vilification", as illustrated by Justice Brennen's ascertion that the nineteenth century "position of women in our society was, in many respects comparable to that of blacks under the pre-Civil War slave codes;" and (3) that the suspect class, largely because of past discrimination, lacks effective political power and redress. *Murgia, supra,* defines a suspect class as one who has "experienced a history of purposeful unequal treatment" or has "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."

When you compare the class involved in this instant

case, it is evident that Yakima Indians clearly fit within this Court's standards delineating a (non-racial) suspect class. Certainly Yakima Indians have been a separate distinct minority group of like characteristics and have been subjected to "unique disabilities." Yakima Indians have "immutable characteristics", suffering "historical vilification" and because of past discrimination "lack affective political power and redress." They likewise have clearly "experienced a history of purposeful unequal treatment."[80]

United States v. Antelope, 430 U.S. 641 (1977) does not foreclose Yakima Indians from being a "suspect class". We do not believe that is the holding of either *Antelope*, *United States v. Mazurie*, 419 U.S. 544 (1975), *Morton v. Mancari*, 417 U.S. 535 (1974), or *Fisher v. District Court*, 424 U.S. 382 (1972). We believe this Court has more logically determined that the Indians were not being discriminated against because either (a) they were not making that claim, or (b) they were within an established system of their own laws or (3) that the unequal treatment of Indians was reasonably necessary to accomplish the legitimate federal objectives existing because of the unique relationship between the federal government and Indian tribes. This Court made that very clear in its emphasis

[80]FINAL REPORT OF THE AMERICAN INDIAN POLICY REVIEW COMMISSION, Volume 1, Chapter 1. (1977)

on the tribal membership of the Indian parties in *Antelope, supra* and *Fisher, supra.*

This brings us to the other applicable category of protecting a "fundamental right." We hope in our discussion it is not too fundamental to initially point out that the very equal protection of person and property that the Yakimas request is explicitly specified in the Fourteenth Amendment.

A due process variant of strict review for fundamental rights found its seminal expression in *Palko v. Connecticut*, 302 U.S. 319 (1937). There, in determining that due process does not require the states to abide by the double jeopardy clause, Justice Cardoza stated the two tests for determining whether state action offended due process. These tests were whether the state action (a) subjected individuals to "hardships so acute and shocking that our policy will not endure it," or (2) violate "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Justice Frankfurter also found an "independent potency" in the principle of due process and found that it demanded, in criminal cases, an examination of "the whole course of proceedings in order to ascertain whether they offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples toward those charged with most henious offenses." This "fundamental fair-

ness principle" "involved in "fundamental rights" cases can be seen to be operating in *Gideon vs. Wainwright*, 372 U.S. 335 (1963) in which this Court held that accused indigent felons must be provided with free counsel. It was likewise apparent in the civil case of *Brody v. Connecticut*, 401 U.S. 371 (1971) which involved the forma pauperis rights of divorce petitioners. It was also obvious in *Griffin vs. Illinois*, 351 U.S. 12 (1956), where this Court held that the state must provide indigent convicted persons with free trial transcripts. It was likewise obvious in *Douglas vs. California*, 372 U.S. 353 (1963), where this Court held the state must provide free counsel to indigents on appeal. In these cases, this Court emphasized that there could be no equal justice in criminal cases where *uniform* access and treatment by the courts was not accorded *to all*. We suggest this Court's holdings, in these cases, are applicable here.

We also note *Skinner v. Oklahoma*, 316 U.S. 535 (142) where this Court struck down an Oklahoma statute requiring the sterilization of persons convicted of felonies involving moral turpitude. There this Court held that "when the law lays an *unequal* hand on those who have committed intrinsically the same quality of offense" that "it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

Shapiro v. Thompson, 394 U.S. 618 (1969) contains the fully developed analysis of the required equal protection scrutiny. In *Shapiro*, Justice Brennen, articulated the standard to be applied when classification in state legislation interefered with fundamental rights, saying:

> "[A]ny classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." (Emphasis supplied)

Under this standard, this Court's analysis of the many preferred state interests in, and reasons for regulation, was very much the strict kind of analysis familiar in First Amendment cases. This Court has used such familiar First Amendment tools as overbreath and less restrictive alternative analysis to strike down state's unequal treatment. Judge Harlan, preferring ,as he consistently did, to use due process, to analyze the propriety of state regulation of important interests; dissented sharply in *Shapiro* from the use of the compelling state interest doctrine.

While there are certain advantages to use due process to analyze the propriety of state regulation, this court apparently would prefer to find an infringement of a "fundamental" right in order to utilize strict scrutiny. In *San Antonio Independent School District v. Rodreguiz*, 411 U.S. 1 (1973), Justice Powell, writing for the majority stated:

"[T]he answer lies in assessing whether there is a

right to education explicitly or implicitly guaranteed by the constitution."

Since the *Rodreguiz* majority could not find in education a right so guaranteed, it refused to apply the strict scrutiny test. Justice Marshall, in his dissent, expanded on his equal protection review position, giving a remarkably full and firm statement to the general proposition that in a system premised by judicial review, it is incumbent upon this Court to scrutinize state legislation to a degree commensurate with the importance of the interest burden.

In the present case, it is evident that no matter what test is used, whether it be the due process lack of availability of the judicial system, the protection of a fundamental interest, or a sliding scale of review depending upon the importance of the matter involved; a degree of judicial scrutiny is required that would forbid Washington's unequal action that is not substantiated in the *necessary* fulfillment of the purpose of Public Law 83-280.

Indeed, any permissible interference with the Yakima Nation's explicit and implicit power to control its internal affairs can only be based on the Yakima's right of protection. This right to be protected from the wrongdoings of non-members is a treaty guaranteed right and fundamental.[81] Citizens may not have a

[81]The basic stated reason for moving Yakimas to the small reserved portion of their ancestral lands was to "protect them from bad white men." See: Treaty Minutes. Yak. App. B.

fundamental right to a government job as this Court stated in *Murgia,* but Yakima Indians most certainly have a right to be protected from wrongful acts. Indeed, it is hard to imagine a more fundamental governmental right.

We believe it is clear, that because of this partial geographic and subject matter assumption and the state's unwillingness or inability to act, that Yakima Indian victims of crimes are not provided with equal protection of their person or property.

Likewise, we would now like to discuss how the inequality under Washington's title based system puts the liberty of Yakima Indian offenders in jeopardy.

The following chart will show some[82] of the unequal differences that is solely determined by the title to the land upon which the offense is committed:

Incident or Offense	*Trust*	*Non-trust*
Any felony	Entitled to a grand jury. Amendment V.	No grand jury, Not provided.
	Petit Jury must provide fair cross section of population 28 USCA §1861	From registered voters. RCW 2.36.060
Non-Capital cases	Release without bail unless won't insure appearance 18 USC §3146	Bail specified without presumption RCW 10.19.010

[82]This is limited because of the difficulty of making comparison between the elements of federal crimes and state crimes.

Incident or Offense	*Trust*	*Non-trust*
Voluntary Manslaughter	10 years 18 USC §1111	$10,000 and 10 years. RCW 9A.32.060
Involuntary Manslaughter	$1,000 and 3 years 18 USC §1111	$5,000 and 5 years RCW 9A.32.070
Carnal knowledge	First offense 15 years and second offense 30 years 18 USC §2032	Five years RCW 9.79.220
Robbery	15 years 18 USC §2111	20 years RCW 9A.56.200

Here again, the fundamental rights of Yakima Indians are in jeopardy to further no rational or reasonable purpose.

IV.

PROVISIONS OF RCW 37.12.010 DO NOT MEET CONSTITUTIONAL STANDARDS FOR DEFINITENESS

Even if Washington's partial geographic jurisdiction exercised bythe State of Washington meets constitutional standards, the partial subject matter assumption does not. Within trust or restricted Indian lands, the State purports to assume criminal and civil jurisdiction over eight enumerated categories:

1) Compulsory school attendance
2) Public Assistance
3) Domestic Relations

4) Mental Illness
5) Juvenile Delinquency
6) Adoption Proceedings
7) Dependent children
8) Operation of motor vehicles upon the public streets, alleys, roads and highways.[83]

There are no provisions in the Washington Act, or otherwise to define what matters are covered by these stated categories. The Yakima Nation believes that this statute, both facially and as applied, fails to meet constitutional standards as announced by this Court. This Court has held that statutes must provide the due process concerns of adequate notice and non-discretionary standards. RCW 37.12.010 satisfies neither concern of this Court.

As regards the notice requirement, *Connolly v. General Construction Co.*, 269 U.S. 385 (1926) has become a touch stone because of its lucid explanation of that requirement:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what condust on their part will render theim liable to its penalties, is a weil recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which neither forbids or requires a doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (at 391).

[83] R.C.W. 37.12.010. App. p. 37.

The fact that the non-discretionary standards test is not as clearly defined, does not detract from its importance to this Court. The fear that lack of specific standards permits police and judiciary unjust discretionary powers, is deeply rooted in this country's history and forms a major policy theme of the vagueness doctrine in *United States v. Reese*, 92 U.S. 214, 221 (1875) and this Court has continued to require that state statutes meet non-discretionary standards as late as *Bigelow v. Virginia*, 421 U.S. 809 (1975). This Court's test is whether the potential for abuse of discretion exists, not whether such an abuse has actually occurred. Often, as here, the language of the statute under scrutiny indicates on its face that a purely subjective judgment may be made.

The Yakima Nation has standing to challenge this statute. 25 USC §1362 reads as follows:

> "The District Court shall have jurisdiction of all civil action, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of Interior, when the matter in controversy arises under the constitution, laws, or treaties of the United States."

The Yakima Nation also has standing under this Court's holding of *Bigelow v. Virginia*, 421 U.S. 809, 815 (1975). The Yakima Nation's facial and applied vagueness attack upon the lack of notice and non-discretionary standards is brought on behalf of its members not only for those who can be charged with crimes under this overbroad statute, but also on behalf of the Yakima victims of such crimes. Consider the plight of a Yakima victim who after ascertaining that the offense has taken place on trust lands and has ascertained that the perpetrator of the offense is a person within the purview of the state's statute and who then must then determine whether the offense falls within any of the eight categories. If a determination is made on the victims part that it does fall within one of the eight categories, the victim is at the mercy of the law enforcement officer who regularly makes irregular ad hoc determinations as to the applicability of state law.[84] The overbreath of the statute also has seriously affected the Yakima Nation's ability to exercise its power of control over its internal tribal matters. The Washington enforcement officer is likewise confused as to what is covered by these eight enumerated categories. There is no portion of this controversy that is so froth with irratic enforcement, decision and improper irregular protection of the person and property as exists under this wide-open subject matter assumption by the state. No one — we repeat — no one knows what areas those eight listed categories cover.

[84]Even the prosecuting attorney of Yakima County states that R.C.W. 37.12.010 has been interpreted differently by prosecuting attorneys. Tr. 212.

V.

ALTERNATIVELY — THE QUESTION OF WHETHER R.C.W. 37.12.010 IS CONCURRENT — OR EXCLUSIVE — ARISES

This Court, like the Circuit Court, may not find it necessary to reach the question of whether Washington's jurisdiction under R.C.W. 37.12.010 is concurrent or exclusive. The District Court held that Sections 2(a) and 2(c) of Public Law 83-280 applied and that Washington's jurisdiction was exclusive. If 2(c) is applicable, it does remove federal jurisdiction from the reservation. However, there is nothing in Sections 2(a) or 2(c) of Public Law 83-280, that limits the power of the Yakima Nation to punish tribal offenders. Under the authority of *United States v. Wheeler*, 46 L.W. 4243 (March 22, 1977), the Yakima Nation has jurisdiction to punish tribal offenders and if necessary, this Court should overrule the holding of the District Court below and so declare.

CONCLUSION

For the reasons above, this Court should sustain the holding of the Circuit Court striking down R.C.W. 37.12.010 and reverse the judgment of the District Court below.

Alternatively, this Court should hold that R.C.W. 37.12.010 is concurrent with tribal jurisdiction and reverse the District Court below.

Dated: May 20, 1978

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 1978, three copies of the Brief of Appellee and seperate Appendices were mailed, postage paid, to Slade Gorton, Attorney General, Malachy R. Murphy, Deputy Attorney General, Timothy R. Malone, Assistant Attorney General, Paul Majkut, Assistant Attorney General, Temple of Justice, Olympia, Washington 98504, attorneys for appellant, State of Washington, Dixy Lee Ray and Slade Gorton. I further certify that on this 25th day of May, 1978, three copies of the Brief of Appellee and seperate Appendices were mailed to Jeffrey Sullivan, Prosecuting Attorney, Yakima County Courthouse, Yakima, Washington 98901, Attorney for Appellants, Yakima County, Les Conrad, Graham Tollefson and Charles Rich. I further certify that all parties required to be served have been served.

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